INDEX

CITATIONS

730291—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 770

THE CITY OF PORTLAND, A MUNICIPAL CORPORATION, PETITIONER

v.

PUBLIC MARKET COMPANY OF PORTLAND AND RECONSTRUCTION FINANCE CORPORATION AND THE FIRST NATIONAL BANK OF PORTLAND (OREGON)

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION AND THE FIRST NATIONAL BANK OF PORTLAND (OREGON) IN OPPOSITION

OPINIONS BELOW

The opinion of the court below is reported in 170 P. 2d 586. The previous decisions of the court below in the same case are reported in 160 Or. 155 and 171 Or. 522.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on June 25, 1946. A petition for re-

hearing was filed on August 20, 1946, within the time for such filing as extended. This petition was denied on September 10, 1946. The petition for a writ of certiorari was filed on December 10, 1946. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner's right to due process was infringed by application of the law of the case, as determined on a former appeal, or by the exercise of the court below of its jurisdiction to determine issues not previously passed upon by the trial court.

STATUTES INVOLVED

Sections 9–202 and 10–810, of the Oregon Code are set forth in the Appendix, *infra*, pp. 21–23.

STATEMENT

In 1931, the petitioner entered into a contract with Public Market Company of Portland for the purchase of a public market building to be erected by the Market Company according to plans approved by the City. In 1933, the Reconstruction Finance Corporation provided funds for the erection of the building, taking as security for the Market Company's bonds a mortgage and an assignment of the Market Company's contract with the City. The building was completed in

1934. The City then rejected a tender of conveyance by the Market Company and repudiated the contract. (171 Or. 587, 589, 590, 170 P. 2d 588, 589, 591–594.)

The present suit was commenced in 1935 by the Market Company against the City, the Reconstruction Finance Corporation and its bond-trustee (the First National Bank of Portland, Oregon) being joined as defendants. The complaint has at all times set forth the contract in full, and prayed for an accounting, specific performance, and general equitable relief. From the first, the legal effect of the contract was in dispute between the parties, the City contending that it imposed only a conditional or "special-fund" obligation (i. e., an obligation to pay for the market only out of the proceeds of income bonds designated as "utility certificates") and the Market Company contending that the contract created a general obligation on the part of the City.

The trial court sustained a demurrer to the second amended complaint, and appeal was taken to the Supreme Court of Oregon, which, in an opinion reported in 160 Or. 155, reversed the trial court, holding (1) that the contract on its face expressed a general obligation, (2) that if the contract should be determined to create only a special-fund obligation, the second amended complaint nevertheless stated a good cause of action for equitable relief and should be enforced *in this*

action (point 11, 160 Or. 166, 167, *et seq.*). The case came on for trial before the Circuit Court of Multnomah County, Oregon, which held: (1) that the contract created only a special-fund obligation, and (2) that the contract had not been performed by the Market Company. Judgment was thereupon entered in favor of the City, and a second appeal was taken to the Supreme Court of Oregon. On the second appeal, the decision of the trial court was again reversed, the Supreme Court holding (1) that the contract created only a special-fund obligation, (2) that the contract had been fully performed by the Market Company, (3) that it had been breached and repudiated by the City, (4) that equity was competent to grant relief in the present suit, (5) that specific performance was impracticable, and (6) that, in lieu of specific performance, the Market Company was entitled to recover an amount equal to the contract price, less the market value of the property at date of breach. (171 Or. 522.)

No rehearing was sought by the City. Upon remand, the case was tried in the Circuit Court on a third amended complaint which added further allegations that the City had failed to take steps to create a fund through sale of utility certificates, and had repudiated the contract, that the value of the property at date of breach was not in excess of $550,000, and that if the remedy of specific performance should not be available,

plaintiff would have suffered damages in an amount equal to the total amount payable under the contract, less the value of the property at the time of the breach and repudiation by the City in 1934. This complaint contained an additional prayer that in the event specific performance should be denied, plaintiff should recover judgment in an amount equal to the purchase price, less the fair value of the property rejected by the City, with interest thereon. (Abstract, Third Appeal, 1944, pp. 17–22.) The City repeated the defenses theretofore pleaded, and added allegations to the effect that the value of the property in 1934 was in excess of the amount to be paid under the contract, that public utility certificates could not have been sold for a price in excess of thirty cents on the dollar, that, owing to plaintiff's incompetent operation of the market, such certificates could not have been sold on or after November 14, 1934 for a price in excess of twenty cents on the dollar, and that the City had not theretofore had an opportunity to plead these matters, and would be denied the equal protection of the laws and deprived of its property without due process of law if not permitted to make such defense. (Abstract, Third Appeal, 1944, pp. 49, 68.)

Upon the second trial in the Circuit Court, that Court ruled that the opinion of the Supreme Court of Oregon, rendered on the second appeal,

constituted the law of the case with respect to the measure of damages, but received and transmitted to the appellate court all evidence offered by the City.

On the third appeal, the Supreme Court of Oregon (1) held that the Circuit Court was correct in treating the decision on the second appeal as the law of the case with respect to the remedy to be granted and the measure of damages, (2) heard the case de novo as required by Oregon Code, Sec. 10-810, and (3) entered judgment in favor of the Market Company in an amount in excess of that of the judgment rendered in the court below. (170 P. 2d 586.)

ARGUMENT

After nearly twelve years of litigation, two extended trials, and three appeals to the Supreme Court of Oregon, all with respect to the determination and enforcement of the liability of the petitioner arising from its nonperformance and repudiation of a written contract, petitioner seeks certiorari from this Court on the ground that it has been denied a day in court with respect to the measure of its liability.

1. The petition appears to be based on a misconception of the purpose and effect of the Fourteenth Amendment. Passing the serious question as to the right of a municipal corporation to invoke the Fourteenth Amendment against action by the State of which it is a creature (see *Williams*

v. *Mayor*, 289 U. S. 36, 40, and cases cited), the petitioner does not deny that it has had full opportunity to present in the Supreme Court of Oregon all possible issues in connection with the measure of its liability under the contract. What petitioner claims is that issues which, under the decision of the court below on the first appeal, should have been, but were not, passed upon by the trial court, were passed upon by the Supreme Court of Oregon on the second appeal, and were erroneously held to have become the law of the case (Pet. 30).

Plainly, no constitutional requirement prevents a State from providing that, upon appeal, equity causes shall be heard anew by the Supreme Court of the State, and that the decision of that court on all non-federal questions, whether or not theretofore passed upon by a lower court, shall be final. The court below has indicated (170 P. 2d at 591) that in passing upon the issue which had not been determined by the Circuit Court, it acted pursuant to Section 10–810 of the Oregon Code, (Appendix, *infra*, p. 23), and has held that under that statute the Supreme Court of the State possessed jurisdiction to determine on the second appeal all phases of the case, including the question of the measure of the City's liability under a special-fund obligation. The decision of the highest court of the State with respect to the legal effect of a State statute regulating the jurisdiction of State courts not being subject to review

by this Court, it follows that the correctness of the decision of the court below in this regard presents no federal question.

2. The petitioner's further contention (Pet. 30) appears to be that before the decision on the second appeal (171 Or. 522) the suit did not involve consideration of the respective rights and liabilities of the parties if the contract should be construed as creating only a "special-fund" obligation, and that determination of the extent of the City's liability under a "special-fund" contract did not come into the case until the third amended complaint was filed. Some due process infirmity is sought to be drawn from these alleged facts, but the record and the City's briefs as presented in the court below, show the factual inaccuracy of the petitioner's claim.

That the Market Company's rights under a special obligation contract, dependent upon the issuance of "utility certificates," were considered by the City to be in issue under the pleadings as they stood on the first and second appeals, is disclosed in the City's argument in support of its petition for rehearing on the first appeal. The City, referring to the second amended complaint, says (pp. 1 and 2):

> The theory of respondent, City of Portland, is that the last amended complaint fails to state sufficient facts * * * (2) because there is no allegation showing

> that the special fund from which payment is to be made is created, and (3) because a court will not take jurisdiction to grant specific performance where (as here, in case of selling utility certificates) a supervision of performance requires an exercise of administrative judgment and discretion.

Here the City recognized as early as 1938 that the purpose and effect of the second amended complaint was to pray for specific performance of the contract, if the contract should be held to constitute a "special fund" rather than a general obligation of the City, as well as for specific performance if the contract should be construed as constituting a general obligation of the City. That the second amended complaint has always been construed by the City as seeking specific performance of the contract, if the contract should be construed as a "special fund" obligation, is again made clear on page 44 of the same brief, where the City says:

> * * * if the contract be construed as a contract to be paid only from a sale of utility certificates, jurisdiction should not be taken, in view of the necessary details and administrative judgment in advertising for and obtaining bids and making an award thereon.

The Transcript of Record on the first appeal (1936) shows that the prayer of the original complaint asked that the City be ordered to do all things necessary in order to permit payment of

the purchase price. The City's brief on that appeal (pp. 63, 64) calls attention to this, as indicating that the Market Company, at the outset of the suit, interpreted the contract as a special-fund obligation.

If relief under a special-obligation contract was not within the issues, the "street improvement cases" referred to by the court below could have had no relevance. It is stated, however, in the opinion of that court on the last appeal (170 P. 2d at 590), that the City, in its argument of the second appeal, while at one point disputing the applicability of the so-called local improvement cases (though not that their applicability was in issue) at another point conceded in its brief the applicability of such cases, saying:

> It is not true that the city was "free to defer indefinitely the creation of the fund." The City's officers had a definite duty to perform under penalty of suffering a general obligation liability against the City. This duty was to act with a reasonable degree of diligence in the matter of selling the certificates and creating the fund, just as in the case of street improvements to be paid for by a special fund to be raised by an assessment against the property benefited. The city's officers have the duty to act with reasonable diligence in the matter of making a valid assessment, and, if possible, selling the property if the owners fail to pay.

In remanding the case to the Circuit Court on the first appeal, even the judges who concurred in holding that the complaint created only a special-fund obligation held (160 Or. 195) that the case should be remanded "in order to determine whether or not the plaintiff has fully performed its part of the contract and *to ascertain what relief if any should be granted the plaintiff.*" The majority opinion, which interpreted the contract as on its face creating a general obligation, also directed trial of that issue. (160 Or. 166, 167.) The Circuit Court, on the first trial of the case before Judge Wilson, failed to pass on this question. On the ensuing appeal, the case was submitted to the court below on four assignments of error, of which the fourth was that the court below had erred in denying plaintiff such relief as might be appropriate to the City's breach of the Market contract, interpreted as a special or a limited-obligation contract. The briefs on that appeal show that this assignment of error was fully presented and argued by the Market Company and the Reconstruction Finance Corporation, and that they contended that because of changes in the situation resulting from the City's abandonment of the project, performance through the issuance of utility certificates had become impossible, and that if the contract were construed as a special-fund obligation, the City's default imposed liability upon the City for the full

amount of the purchase price under the rule of the local improvement cases, leaving upon the City the burden of salvaging any value remaining to the property. (Appellant's opening brief, Second Appeal, pp. 250–255). The Reconstruction Finance Corporation and the Market Company, in that argument, mentioned and answered the contention of the City, made at the trial, that securities of the type proposed were not salable at the time of the tender. The City's answering brief asserted that the claim for damages was not within the issues made by the pleadings, and contended at length that there was not liability because (1) the Market Company had not performed on its part, (2) the City was not negligent, and (3) the Market Company was not free of contributory negligence (Respt. Br. 2d Appeal, pp. 558–573). These are the very issues that the City now avers it had has no opportunity to assert.

Petitioner, claiming that new issues were injected into the case after the second appeal, sets forth certain defenses set up by the City in answer to the third amended complaint, and states (Petition, p. 15) that

> "The City had previously had no occasion to set up these matters," [i. e., that a price in excess of 30 cents on a dollar was not obtainable for the utility certificates, and that the negligence of the Market Company, in unskillfully operating the market, and

> the condition of the bond market, prevented sale of the certificates][1] "as a defense against the Company's previous claim."

This statement is in the teeth of the record (Paragraph 9 of the City's Answer, and Paragraphs XXII and XXV of the City's Separate Answer and Counterclaim, Appellant's Abstract of record on second appeal). The City contended, in the Second Appeal, (Appellant's Abstract of Record on second appeal, p. 46) that:

> * * * plaintiff has failed to complete its obligation under said contract in this, that it failed to have the market building therein referred to so occupied as to be a going public market utility within the terms and provisions of said contract * * *.

The city further asserted at this time that the plaintiff (*id.* at p. 85):

> * * * failed within a reasonable time thereafter to establish in said building a going public utility within the intent and meaning of the parties hereto so that public utility certificates might be issued and sold * * *.

And the City alleged, in defense (*id.* at p. 81):

> * * * that the plaintiff by its acts, prevented this defendant from receiving an

[1] The City mentions also its allegation that the property was worth the full purchase price at date of breach. As the city's evidence in that record was not excluded, this presents no issue here.

> approving legal opinion for the sale of said utility certificates and caused a sale thereof to become impossible * * *.

The City's present contention, that default on the part of the Market Company was the cause of the City's default, was asserted from the earliest stages of the suit. On page 35 of the City's argument in support of petition for rehearing of the first appeal, the City said:

> It is maintained by the City that the Company has failed thus far to have the market so occupied as to be a going public market utility, and that an attempt to sell the utility certificates would be ineffectual until this portion of the Company's obligations shall have been performed.

The opinion of the court below, which has heard the case on three appeals, makes it clear that there has been no change in the issues. The court states that (170 P. 2d at 591):

> As to the claim that new evidence and different legal principles have come into the case since the last reversal, it is sufficient to say that there is no new evidence of a different character than that which was before us on the former appeal, although there is some evidence that is cumulative of the old; and that what is urged as the application of new legal principles comes down at the last to a challenge of the rule of damages which we announced, or an attempt in a different guise to show

> that the plaintiff did not fully perform, notwithstanding that we have held to the contrary.
>
> We must, therefore, decline to inquire again into the question of the nature of the relief to which the plaintiff is entitled. And, since that question was fully presented on the former appeal, in the briefs and on the argument, and counsel for the city had ample opportunity to be heard upon it and were heard, there is no merit in the suggestion that the requirements of due process of law have not been met.

The petitioner's only proper basis of complaint is, therefore, not that the measure of the City's liability was not within the pleadings under the second amended complaint, as determined by the court below on the first appeal, and not that the City did not have a day in court on the issue of the measure of damages, but that the court below erred in interpreting the law of the State with respect to whether the rule of damages to be applied must first be determined by the Circuit Court rather than by the Supreme Court. This issue has already been discussed under Point 1.

A superficially plausible theory advanced by the petitioner is that because courts have, by a legal fiction, classified the recovery of indemnity for failure of municipal corporations to perform their obligations under special-fund contracts as "sounding in tort", therefore the enforcement of

an analogous remedy in this suit should be regarded as the substitution of a new cause of action. Petitioner, however, suggests no reason why the fact that some courts have classified such relief as "sounding in tort" requires that application of an equitable remedy for breach of a contract which the plaintiff has been duly adjudicated to have fully performed, and which the defendant has been duly adjudicated to have wrongfully breached, should, for constitutional purposes, be considered to constitute anything different from what it really is.

Petitioner, in its contention that the suit was metamorphosed into a tort action for negligence, misconceives the basis of the relief granted below, as well as the scope of the complaint. While at one point in its decision using the words "ex delicto," the court makes it indisputably clear that the recovery was granted as equitable relief for breach of the City's contractual obligation under the contract, set up in the complaint. The opinion on the second appeal squarely states that recovery is not based on "negligence" but on an intentional breach and repudiation of a contract (171 Or. at 590):

> * * * if the City was not guilty of negligence, it was guilty of something worse—an outright and unwarranted refusal to be bound by its lawful undertaking. Under the broad principle of which the local improvement cases *furnish an*

> *illustration,* negligence is not the touchstone, but the failure, whether intentional or otherwise, to use the diligence which "the contract itself imports". * * * The doctrine is, in truth, founded in common honesty and in the law's purpose *to prevent evasion of the obligations of a contract.* It governs the conduct of municipalities no less than others. [Italics supplied.]

No constitutional infirmity results when equitable relief cannot be decreed and damages as an alternative remedy are decided upon. Surely, the defendant in such a suit cannot hope to retry, in the determination of the damages recoverable, questions theretofore considered and decided.

Stated objectively, what the petitioner really complains of is that the court below, upon reaching the conclusion that the proper equitable remedy was a money judgment in the amount of the contract price, with credit to the City for the value of the property unjustly left in the Market Company's hands, did not remain silent as to what remedy equity should extend, and merely remand the case to a trial court for further hearing, instead of instructing the trial court in a manner sufficiently definite to permit prompt disposition of the case. Petitioner's theory appears to present no federal question, and would hobble appellate courts exercising statutory authority to review equity decisions de novo, and prevent such courts

from granting effective remedies without multiple appeals. See 170 P. 2d at 591.

It is familiar law (and was conceded in the City's brief in the last appeal to the court below, pp. 17–18) that a prayer for general relief, such as that contained in the 2nd amended complaint, on which the case was presented on the first two appeals, operates to enlarge or broaden the relief sought within that which the facts alleged in the bill show complainant has a right to ask, and that, under such a prayer, relief, different from that contained in the prayer, may be granted if justified by allegations and proof, and that "a prayer for general relief empowers the court to grant whatever relief the facts alleged and proved require, even to the granting of other and additional relief from that specially prayed for if supported by the allegations of the complaint or bill, and established by competent evidence." *Ibid.* Otherwise, such prayers would be futile. The relief granted was therefore available under the second amended complaint on which the case was heard on the second appeal, without further amendment of the pleadings.

3. The record shows that the court below considered and discussed in detail all issues presented with respect to any interference or responsibility of the Market Company affecting issuance of public utility certificates by the City. (170 P. 2d at 592–593.) In the last trial of the case in

the Circuit Court, petitioner offered, and the Court received under its equity rule, all evidence that the City desired to present regarding the causes of the City's refusal to perform its contract and the alleged nonperformance of the Market Company's obligations. This evidence was brought to the court below on the third appeal. After considering all such evidence, notwithstanding the Court's ruling that the decision on the second appeal constituted the law of the case, the court below stated (all judges concurring) that the new evidence did not justify a conclusion different from that expressed on the second appeal (170 P. 2d at 594):

> The charge now made that it was the conduct of the plaintiff which prevented the issuance and sale of public utility certificates is an after-thought; the truth is that the City's disregard of its duty was the result of its decision that it did not want the market building and did not wish to engage in the market business. We said in our former opinion, in speaking of this matter, that the City was guilty of "an outright and unwarranted refusal to be bound by its lawful undertaking." (171 Or. 590.) Not only is that statement the law of the case, but *nothing that has been called to our attention since it was made furnishes any ground for thinking that it was not just and correct.* [Italics supplied.]

Consequently, the City has been accorded an adequate hearing on this question and there is no basis for its assertion that it has been denied due process.

CONCLUSION

The court below having considered all evidence offered by the petitioner, no federal question is presented in that regard. It does not appear that petitioner has been deprived of any constitutional right. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY, 1947.

APPENDIX

Oregon Compiled Laws, Code of Civil Procedure, Section 9–202

Issues of fact triable by court unless referred: Reference: Reduction to writing of testimony offered or taken: Findings. All issues of fact in suits in equity shall be tried by the court unless the same are referred to a referee pursuant to the provisions of section 4–304 of this code; provided, that in districts composed of no more than one county and having more than one judge of the circuit court, no cause shall be referred to a referee without the consent of all parties to such suit in writing filed in said cause, except in suits involving the examination of long and complicated accounts. If tried before the court, the evidence shall be presented, and at the request of any of the parties to such suit or if required by the court, reduced to writing, to be either in longhand or type, or in stenographic notes, which shall, when ordered by the court, be extended into longhand or type and filed with the clerk of the court in the cause. Where evidence is offered by any of the parties, and excluded by the ruling of the court, the party so offering the testimony shall be entitled to have the same taken down in like manner as the testimony admitted, but the same shall be marked and designated as evidence offered, excluded and excepted to. The party offering said testimony shall be required to pay

for taking such testimony so excluded, unless the court on appeal may hold the same was competent. Where the stenographic notes of the testimony are not required to be extended by any of the parties, or required by the court, they shall be filed in the cause. It shall not be necessary for the court, in equity suits, to make special findings of fact. If special findings are made, the court, in rendering its decision, shall set out in writing its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon, but such findings of fact and conclusions of law shall be separate from the decree, and shall be filed with the clerk and incorporated in and constitute a part of the judgment roll of said cause; and such findings of fact shall have the same force and effect and be equally conclusive as the verdict of a jury in an action at law, except on appeal to the supreme court the cause shall be tried anew without reference to such findings. [L. 1862; D. Sec. 393; L. 1866, p. 12; L. 1870, p. 27; L. 1872, p. 116; L. 1874, p. 94, Sec. 1; L. 1885, p. 69, Sec. 1; L. 1889, p. 139, Sec. 1; H. Sec. 397; L. 1893, p. 26, Sec. 1; B. & C. Sec. 406; O. L. Sec. 405; L. 1925, ch. 80, p. 108; L. 1927, ch. 134, Sec. 1, p. 153; O. C. 1930, Sec. 6–202.]

OREGON COMPILED LAWS, CODE OF CIVIL PROCEDURE, SECTION 10–810

How judgment or decree reviewed: Ground for reversal or modification: Trial anew. Upon an appeal from a judgment, the same shall only be reviewed as to questions of law appearing upon

the transcript, and shall only be reversed or modified for errors substantially affecting the rights of the appellant; but upon an appeal from the judgment of a county court or justice's court, the action shall be tried anew, upon substantially the issues tried in the court below; and upon an appeal from a decree given in any court the suit shall be tried anew upon the transcript and evidence accompanying it. [L. 1862, p. 137; L. 1864; D. Sec. 533; L. 1866, p. 15, Sec. 5; L. 1870, p. 34, Sec. 8; D. & L. Sec. 533; L. 1885, p. 69, Sec. 4; L. 1889, p. 141, Sec. 4; H. Sec. 543; B. & C. Sec. 555; L. O. L. Sec. 556; O. L. Sec. 556; O. C. 1930, Sec. 7–510.]

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